



Consumer and Corporate Affairs Canada

. Ottawa / Hull. Canada Kl A OCg

May - 51988

Messrs. Smart & Biggar P.O. Box 2999, Station D Ottawa, Ontario. KIP 5Y6

votre reference Your file 64055-200 Notre reference Our file 501, 610

Messieurs,

Sujet: PROCEDURES SELON L'ARTICLE 44 Enregistrement No. TMA 287,954 Marque de commerce: ARROW & Dessin

Veuillez trouver ci-joint la décision du Registraire au sujet de l'affaire précitée.

Bien \grave{a} vous,

Gentlemen,

Re: SECTION 44 PROCEEDINGS
Registration No. TMA 287,954
Trade Mark: ARROW & Design

Please find herewith the Registrar's decision in the above matter.

Yours truly,

 $\hbox{ D. Savard } \\ \hbox{ pour le REGISTRAIRE DES MARQUES DE COMMERCE } \\ \hbox{ for REGISTRAR OF TRADE MARKS}$

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Consumer and Corporate Affairs Canada

Ottawa / Hull. Canada K1A OC9

Mai - 51988

Gow11ng & Henderson P.O. Box 466) Station A Ottawa) Ontario.
KIN 8S3 .

Votre reference Your file 625 626 3 03 Notre reference Our file 501,610

Gentlemen:

RE: SECTION 44 PROCEEDINGS Registration No.: TMA 287)954 Trade Mark: ARROW & Design

At the request of Messrs. Smart & Biggar on behalf of Arrow Electronics) Inc.) the Registrar issued a s.44 notice dated February 18, 1987 to Arrow Products International Inc.) the owner of record of the above referenced trade mark registration.

The trade mark ARROW & Design was registered on February 17) 1984 for use in association with "microcomputers) printers) disk drives and monitors". Following an assignment Microlink Industries Ltd. became the new owner on April 1, 1983. The assignment was recorded nunc pro tunc.

In response to the Registrar's notice the registrant furnished the affidavit of its Director) Mr. Denis Lee along with Exhibits A to E. Further to the filing of this evidence the requesting party requested an oral hearing. The hearing was held on March 29, 1988 and both parties were represented.

At the hearing) counsel for the requesting party criticized the evidence as follows:

The evidence is deficient because it does not meet the requirements of s. 44(1) and s. 4(1) see Plough (Canada)
Ltd. v Aerosol Fillers Inc. 53 C.P.R. (2d) 62
and Sim & McBurney v. Majdell Mfg. Co. Ltd. 11 C.P.R. (3d) 306:

The normal course of trade is nowhere described.

If however it is found that the normal course of trade has been described then the evidence does not show actual use or actual sales) the last invoice bearing a date in August 1985) while the s. 44 notice is dated February 1987.

The affidavit is ambiguous and vague especially paragraphs 4 and 6.

On the other hand) counsel for the registrant commented as follows:

The requirements of s. 44 are not as rigid in view of recent decisions and the registrant should not lose its registration over technical objections.

The normal course of trade is clear.

From the affidavit it is clear that the trade mark is in use with the registered wares; the evidence shows use of the trade mark even though it does not show sales up to the date of the notice ${}^{\bullet}$



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As part of its rebuttal, counsel for the requesting party commented as follows:

The objections are not of a technical nature since it is clear that s. 44 requires that the registrant show use or show non use with reasons, and the registrant has not met such onus.

The words "at the time of the transfer of the property in or possession of such wares \cdots " appearing in s. 4(1) require that there be sales of the wares.

I have reviewed the evidence filed together with the parties' arguments and am satisfied that the evidence shows use of the trade mark at and prior to August 1985; however the question raised in these proceedings is whether the trade mark was in use on February 18, 1987 or immediately prior thereto.

At paragraph 3 of the affidavit Mr. Lee clearly asserts use since April 1983. Nowhere in the affidavit does he clearly make reference to use at the date of the notice or immediately prior thereto or to continuous use from 1983 up to the date of the notice. In paragraphs 4 and 6 reference is made to advertisements and sales "over the past three years". However to support such statements the affiant attaches as Exhibit A samples of flyers, two of those bearing a date in 1984 and the others being undated, and as Exhibit B copies of invoices, such invoices bearing dates in 1983, 1984 and 1985. Therefore one is left to wonder what "past three years" is the affiant referring to. Is he referring to those three years, or to the three years prior to the notice date or the three years prior to the date of the affidavit. I must agree with counsel for the requesting party that such expression is vague.

While judicial comment has in some instances retreated from the Aerosol Fillers case, (as in Union Electric Supply Co. v. Registrar of Trade Marks, 63 C.P.R. (2d) 56) so that a conclusion of use may be made where there is not as much evidence as one would like to see, that evidence must be reliable and unequivocal (Union Electric, page 60). In view of the glaring omissions in the evidence before me and the lack of clarity in what is stated I cannot find the evidence reliable and unequivocal.

Counsel for the registrant argued that if the trade mark was in use 18 months ago, it surely was still in use at the date of the notice. I am of the opinion, assuming that the registrant was using the subject trade mark in association with the registered wares at the notice date or immediately prior thereto, that it would have been a simple matter for the registrant to submit some cogent evidence to substantiate such use •

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By reason of the evidence filed in these proceedings, I conclude that the trade mark was not in use at the notice date or immediately prior thereto and that the absence of use is not due to special circumstances that would excuse such absence of use. Consequently its registration ought to be expunged.

Registration No. 287,954 will be expunged accordingly in compliance with the provisions of s. 44(5) of the Trade Marks Act.

Yours truly,

D. Savard Hearing Officer for REGISTRAR OF TRADE MARKS

/mc-4

c.c. Messrs. Smart & Biggar
 P.O. Box 2999, Station D
 Ottawa, Ontario.
 KIP 5Y6

(Ref. 64055-200)

P.S. Since rendering this decision, I received a copy of a recent judgement of the Federal Court of Appeal re: Martin J. Marcus v. The Quaker Oats Company of Canada (dated March 14, 1988). From the reasons for judgement it can be seen that, for purposes of s. 44 of the Act, "use in Canada" must be by the registered owner or registered User. In the present case, however, I do not have to consider if use of the trade mark was by the registered owner as I have already concluded from the evidence that the mark was not in use in Canada at the material time and that there were no special circumstances to excuse the non-use.