

SECTION 45 PROCEEDINGS  
TRADE-MARK: KING  
REGISTRATION NO.: 298,366

On May 8, 2000, at the request of Joseph I. Etigson, the Registrar forwarded a Section 45 notice to KPM Industries Ltd., the registered owner of the above-referenced trade-mark registration.

The trade-mark KING is registered for use in association with the following wares: cement mix, stucco, decorative stone chips, driveway sealer, black top sealer with asphalt emulsion polymer, asphalt crack sealer and de-icing salt, and sand.

In response to the notice, the affidavit of James B. O'Neill together with exhibits was furnished. Each party filed a written argument. An oral hearing has not been requested in this case.

In his affidavit, Mr. O'Neill states that he is President for King Packaged Materials Company, an unincorporated Division of KPM Industries Ltd. He submits that the registrant has continuously for the three-year period prior to the issuance of the Section 45 notice, and continuously since, used its KING trade-mark in association with all of the wares listed in the registration except "asphalt crack sealer". He indicates that the registrant has sold its cement mix, stucco, decorative stone chips, driveway sealer, black top sealer with asphalt emulsion polymer and de-icing salt, and sand, in Canada continuously in the normal course of trade. He explains that the products are sold throughout Canada through retailers such as Home Depot, Revy Home Centres, Home Hardware and Reno Depot. As Exhibit A he encloses representative packaging and labelling showing use in Canada of the KING trade-mark both during the three-year relevant period and continuously since. As Exhibit B, he submits copies of invoices representative of sales. As Exhibit C, he attaches a representative advertisement for the company's products. He states that sales of items covered by the trade-mark KING as mentioned above, range in excess of sixty thousand dollars annually for some products in the KING registration to one million dollars annually for other products.

The requesting party's only argument is that the evidence fails to show use of the trade-mark in

association with each of the registered wares and that the bald statement that the registrant has sold each of the wares except “asphalt crack sealer” is not supported by the invoices or labels submitted as evidence.

The registrant, on the other hand, argues that the requesting party has dissected the affidavit and exhibits which it submits is improper and inconsistent with the jurisprudence. It adds that just because labels and invoices are given for a number of products does not permit an adverse inference regarding the other products. It argues that to do so would give no effect to the testimony in the affidavit.

I totally agree with the registrant. In a Section 45 proceeding, all a registrant is required to do is establish a prima facie case of use and that is all that is expected of him. As stated in *Union Electric Supply Co. Ltd v. Registrar of Trade-marks*, 63 C.P.R. (2d) 56, evidentiary overkill is not required. Further, concerning statements in an affidavit, in *Central Transport v. Mantha & Associates*, 64 C.P.R. (3d) 354 at page 355, the Court distinguished between assertions of use and assertions of facts as follows:

In a sense all statements in affidavits are “bald assertions”; what this court has found to be inadequate in Section 45 proceedings are assertions of use (a matter of law) as opposed to assertions of facts showing use.

I am of the view that the affidavit in this case sufficiently sets out the facts concerning the use of the trade-mark during the relevant period in association with each of the wares “cement mix, stucco, decorative stone chips, driveway sealer, black top sealer with asphalt emulsion, de-icing salt, and sand”. The registrant in this case has clearly enumerated under oath each of the wares sold in association with the trade-mark during the relevant period; it has described the manner the trade-mark was associated with such wares at the time of sale and has provided representative invoices and packaging and labelling as examples of use. There is no reason to doubt the affidavit’s enumeration of the particular wares sold. Further, as stated in *Union Electric*, supra, use must be shown, not examples of all uses. Consequently, when the facts concerning the use are contained in the affidavit, I do not think a registrant is required to bring forward samples of packaging for each ware or an invoice for each ware that it has sold.

In view of the evidence furnished, I conclude that all of the wares except “asphalt crack sealer” ought to be maintained.

Registration No. 298,366 will be amended accordingly in compliance with the provisions of Section 45(5) of the Act.

DATED AT HULL, QUEBEC, THIS 18<sup>th</sup> DAY OF APRIL 2001.

D Savard  
Senior Hearing Officer  
Section 45 Division