

SECTION 45 PROCEEDINGS
TRADE-MARK: ATLANTIS
REGISTRATION NO.: 241,222

On May 2, 2001, at the request of Messrs. Gowling Lafleur Henderson, the Registrar forwarded a Section 45 notice to Jevco Inc. (d/b/a CranBarry), the registered owner of the above-referenced trade-mark registration. The registrant changed its name on June 26, 1999 to Cran Barry, Inc., and the change of name was recorded on the trade-mark register on December 6, 2001.

The trade-mark ATLANTIS is registered for use in association with the following wares:

Protective clothing for marine and leisure sports; namely, rainwear, pants, jackets, hats, shirts and sweaters, and service kits for the repair of such clothing comprising seam sealant, fabric patches, thread, pant clip assemblies, instructions and a waterproof storage container, sold as a unit-marine safety harnesses and parts thereof and flotation lines-sea bags and duffel bags.

Section 45 of the Trade-marks 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/or services listed on 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 use since that date. The relevant period in this case is any time between May 2, 1998 and May 2, 2001.

In response to the notice, the affidavit of John Vinton together with exhibits has been furnished.

Each party filed a written argument. An oral hearing has not been requested in this case.

In his affidavit, Mr. Vinton states that he is Chief Executive Officer of Cran Barry Inc. (formerly Jevco, Inc.). At paragraph 4, he alleges that the registrant and its predecessors in title have been using the trade-mark in Canada in connection with the sale of the wares claimed in the registration. As Exhibit A, he attaches samples of the label that is affixed to the products at the time of sale in Canada. As Exhibit B, he provides a sample of the catalogue showing his company's products bearing the trade-mark and as Exhibits C-1, C-2, C-3 and C-4 he provides samples of the products bearing the trade-mark and distributed by his company throughout Canada. As Exhibit D he attaches a sampling of invoices from May 10, 2000 to May 13, 2001 which, he states, represent sales of the products bearing the trade-mark in Canada. As Exhibit E, he provides a print copy of the web site advertising in Canada his company's products. At paragraph 10 he indicates that the approximate dollar value of sales with respect to the products bearing the trade-mark since 1998 to date are:

<u>Items</u>	<u>2000</u>	<u>2001</u>
rainwear		
pants	185	
jackets	160	
hats		30
service kits, bags		130

The requesting party's main arguments are that the registrant has failed to furnish evidence showing use of the trade-mark in Canada during the relevant period; it submits that the only evidence that attempts to show sales in Canada is found in Exhibit D of the Vinton affidavit, however, Exhibit D consists solely of two order forms, neither of which evidence sales in Canada during the relevant period. As for the dollar value of sales provided in paragraph 10 of the

Vinton affidavit, since there is no indication that the figures represent sales in Canada and as there is no proof that any sales actually took place in Canada during the relevant period, this information is irrelevant to this proceeding.

Having considered the evidence, I find it is ambiguous concerning the use in Canada during the relevant period.

Pursuant to Section 45(1) of the Act the use required to be shown is use at any time within the three year period immediately preceding the date of the notice. Further, pursuant to Section 4(1) of the Act, in order for there to be deemed use in Canada in association with wares, there must be a transfer of the wares occurring in Canada in the normal course of trade and at the time of transfer of the wares the trade-mark must appear on the wares or its packaging or must be so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred. In addition, as indicated in *Marcus, carrying on business as Marcus & Associates v. Quaker Oats Co. of Canada*, 20 C.P.R. (3d) 46, the use must be by the registered owner or a licensee pursuant to Section 50 of the Act.

Here, although Mr. Vinton states that the wares are distributed in Canada, he has failed to show transfers of the wares in Canada during the relevant period. Exhibit D which Mr. Vinton describes as a sampling of invoices from May 10, 2000 to May 13, 2001, merely refers to two sales, the first one being to Ms. Barbara Greb and the second one to Mr. Xavier Dussourd. The sale to Ms. Greb occurred during the relevant period, however, the document shows that the

wares were shipped to an address in the United States. Accordingly, it seems the wares never entered into Canada. Consequently, it is clear that such document does not show a transfer of the wares in Canada.

Concerning the second document, the sale to Mr. Dussourd, it shows a sale subsequent to the relevant period. Consequently, it is irrelevant in showing a transfer of the wares during the relevant period.

Concerning the figures provided regarding the approximate dollar value of sales in association with products bearing the trade-mark, Mr. Vinton has provided the figures for the years 2000 and 2001. However, concerning such figures, he has not clearly indicated that they represent sales in Canada. Since there is actually no clear evidence that any sales actually took place in Canada *during the relevant period*, the figures, without more details, do not permit me to conclude that sales of the wares were made in Canada during the relevant period. Concerning ambiguities in an affidavit, the Court in *Plough Canada Ltd. v. Aerosol Fillers Inc.*, 45 C.P.R. (2d) 194 at page 198 (FCTD) affirmed 53 C.P.R. (2d) 62 (FCA) stated as follows: "...The allegations in an affidavit should be precise and more particularly so with respect to an affidavit under s. 44 (2) [now s. 45(2)] because that is the only affidavit to be received. It should not be susceptible of more than one interpretation and if it is then the interpretation adverse to the interest of the party in whose favour the document was made should be adopted". As the evidence is ambiguous as to whether transfers of the wares were made in Canada during the relevant period, I interpret the ambiguity against the registrant.

I would add that the evidence also appears to show use accruing to Imtra Corp. and not to the registrant. In this regard, the hang tags affixed to the samples of the products attached as Exhibits C-2, C-3 and C-4, bear the following notation “Atlantis is a trademark of Imtra Corp.”. Consequently, the message provided is that Imtra Corp. rather than Cran Barry, Inc., is the source of the wares.

As I have concluded that the evidence completely fails to show that the trade-mark was in use in Canada during the relevant period, I conclude that the trade-mark registration ought to be expunged.

Registration No. 241,222 will be expunged in compliance with the provisions of Section 45(5) of the Act.

DATED AT GATINEAU, QUEBEC, THIS 29TH DAY OF JANUARY 2004.

D Savard
Senior Hearing Officer
Section 45 Division