

SECTION 45 PROCEEDINGS  
TRADE-MARK: SHOR & DESIGN  
REGISTRATION NO: TMA 426,851

At the request of MBM & Co. the Registrar forwarded a notice under section 45 of the *Trade-marks Act* on August 21, 2003 to I. Shor Canada, Ltd. the registered owner of the above referenced trade-mark at that time.

Registration TMA 426, 851 SHOR & Design shown below is registered as a trade-mark in association with:

Jewellery manufacturing equipment and supplies, namely, wax castings, wax model making instruments, wax injectors, wax washes, steam dewaxers, melting pots, burners, moldmaking vulcanizers, mold rubber, mold frames, moldmaking instruments, lubricants, mixers, mixing instruments, sprue bases, investment, burnout furnaces, thermometers, timers, pyrometers, temperature controllers and recorders, melters, ingot molds, casting machines, crucibles, sprue cutters, jeweller's benches, chair, lamps, bench motors, handpieces, micromotors, burs, mounted points, rubber wheels, drill press, twist drills, files, cutters, slitters, welding machines, tweezers, pliers, mandrels, anvils, punch sets, design blocks, bench tools, ring sizers, rolling mills and stands, drawplates, draw tongs, draw benches, measuring instruments, loupes/magnifiers, dust collectors, polishing machines, abrasive discs, brushes, finishing machines, cleaning machines, sand blasters, texturing burs and wheels, air compressors, dryers, setting clamps, engraving instruments and machines, faceting machines, gold testers, stampers, diamond testers, appraising accessories, namely, microscopes, appraisal books, grading sets, refractive index fluid and jeweller's cameras.

The logo consists of the word "SHOR" in a bold, black, sans-serif font, enclosed within a rectangular border.

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. In this case the relevant period for showing use is any time between August 21, 2000 and August 21, 2003.

Use in association with wares is set out in subsection 4(1) of the *Trade-marks Act*:

A trade-mark is deemed to have been 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.

In response to the Registrar's notice, the registrant furnished the affidavit of Stacey A. Smallwood, Trade-mark Agent with the representatives for the registrant. Both the requesting party and the registrant filed written submissions; an oral hearing was not held.

In paragraph 1 Ms. Smallwood identifies herself as a trade-mark agent with the firm of Moffat & Co., agents for the registrant. Attached to the affidavit as Exhibit A is a Certificate of Amendment regarding the registrant's name change from I. Shor Canada Ltd. to Eisinger Canada Ltd. Exhibit B is identified as a product catalogue for the year 2000; however, I note that it actually consists only of copies of certain pages of the catalogue, none of which appear to contain the subject trade-mark.. Exhibit C consists of copies of 5 invoices from the year 2001; I note that the subject trade-mark does not appear on the invoices.

The requesting party argued that the affidavit evidence is inadmissible as hearsay since the affiant is not an officer of the registrant/current owner company, and submitted that the affidavit should be struck in its entirety.

The registrant argued that the Exhibits should be considered admissible since they constitute records made in the usual and ordinary course of business; documents that are

records made in the usual and ordinary course of business are admissible pursuant to section 30(1) of the *Canada Evidence Act*. In this regard I find that the issue here is not admissibility of documents made in the ordinary course of business as it was in *R.v. Martin*, 8 C.R. (5<sup>th</sup>) 246 (Sask.C.A.) cited by the registrant, (indeed typical s.45 evidence often includes records made in the usual and ordinary course of business), rather the issue is the fact that there is no information from which one can conclude that the documents were made in the ordinary course of business. That is to say, Ms. Smallwood makes no statements other than to identify the exhibits; no explanation of how they came into her possession is given and no information that would allow us to conclude that they are actually made by the registrant in the usual and ordinary course of business is given. Accordingly, I cannot conclude that the documents are admissible.

In any event, I find that the affidavit as a whole is inadmissible pursuant to the decision in of the TMOB (S.H.O.) in *Canadian Council of Professional Engineers v. AEC Inc.* (2002), 22 C.P.R. (4<sup>th</sup>) 399. Ms. Smallwood clearly has no personal knowledge of the affairs of the registrant/owner, not being an employee or officer of the said corporation. Further, as noted above, no information is given as to how the documents came into her possession, and accordingly I find even her identification of them to be hearsay and inadmissible. In *Labatt Brewing Co.v. Molson Breweries, a Partnership* (1996), 68 C.P.R. (3d) 216 (F.C.T.D.), it was held that statements made in an affidavit based on information and belief are *prima facie* inadmissible hearsay evidence unless they satisfy the criteria of *necessity* and *reliability*. In the present case, the registrant has not established the *necessity* of submitting evidence by someone other than the registrant/owner, and further, as set out above, without more information about the documents, the evidence (such as it is), cannot be considered *reliable*.

While it has been held on numerous occasions that the purpose and intention of s. 45 is to remove deadwood, and that the burden that has to be met by the registrant is not a heavy one (*Austin Nichols & Co. v. Cinnabon Inc.* (1998), 82 C.P.R. (3<sup>rd</sup>) 513; *Meredith & Finlayson v. Canada (Registrar of Trade Marks)* (1991), 40 C.P.R. (3d) 409 (F.C.A.) 513), there must nevertheless be reliable evidence from which the Registrar can make a

conclusion that the trade-mark has been used in accordance with section 4 of the *Act*. In the present case there is no such evidence.

Having made this decision it is not necessary to discuss the deficiencies in the evidence in detail; however I would note that it would be difficult to come to a conclusion of use within the meaning of s. 4 of the *Act* from the Exhibits as filed.

In view of all of the foregoing, it is my conclusion that TMA 426, 851 for SHOR & Design ought to be expunged from the Register for failure to show use pursuant to Section 45 of the *Trade-marks Act*.

DATED AT GATINEAU, QUEBEC, THIS 13<sup>th</sup> DAY OF SEPTEMBER 2007.

P. Heidi Sprung  
Member,  
Trade-marks Opposition Board