

TRADUCTION/TRANSLATION

PROCEDURE UNDER SECTION 45

TRADE-MARK: GENIE

REGISTRATION No.: TMA253521

On January 16, 2004, upon request by the Canadian Council of Professional Engineers, the Registrar forwarded a notice as set out in section 45 of the *Trade-Marks Act*, R.S.C. 1985, c. T-13 (the "Act") to Labon Inc., owner of the trade-mark covered by the above-mentioned registration.

The trade-mark GENIE ("the "Mark") is registered for use in relation to the following wares: mixture of forage seeds (the "Wares").

Section 45 of the Act requires the owner of a registered trade-mark to show it was used in Canada in relation to each of the wares and/or each of the services specified in the registration at any time during the three years preceding the date of the notice and, if not, to provide the date it was last used and the reason it has not been used since then. The relevant period in this case is January 16, 2001, to January 16, 2004.

In response to the notice, Labon Inc. provided a solemn declaration by Luc Labonté along with Exhibit A. Only the requesting party produced written observations. No hearing was requested.

In his declaration, Mr. Labonté described himself as one of the directors of Labon Inc and duly authorized to act on its behalf and in its name. He claims that during the relevant period, Labon Inc.

used the Mark and sold over 4,000 units of grass mixture in 750g to 20 kg bags. He produced Exhibit A, a computer printout dated March 19, 2004, to support his claims.

In *Borden & Elliott v. Raphael Inc.* (2001), 16 C.P.R. (4th) 96, the senior hearing officer, Denise Savard stated that the trade-mark owner must show use of the Mark in relation to the Wares within the meaning of subsection 4(1) of the Act, namely:

(A) transfer of the property of the wares in the normal course of trade;

(B) association of the trade-mark with the wares at the time of the transfer of the property so that notice of the association is given to the purchaser at the time of the transfer of the property.

The requesting party claims that the owner of the Mark did not meet his burden of proof on this subject. I must agree for the reasons described below.

First, the deponent did not provide any information on the ordinary course of the Mark owner's business. Therefore, for example, we do not know if the alleged sales took place in Canada or elsewhere, whether the sales were retail or to distributors, etc. Moreover, the deponent did not produce any invoices to prove the sale of Wares as claimed in his affidavit. The computer printout is, at best, an internal document that cannot be used as evidence of the sale of wares in Canada in association with the Mark.

There is no evidence of the way the Mark was marked on the Wares or their packaging when they were sold during the relevant period. Finally, there is no evidence of any form of payment or exchange regarding the Wares.

The content of Mr. Labonté's affidavit can be associated to a vague statement of the use of the Mark. It merely claims the use of the Mark without proving it. Although the case law shows us that there is no need to require an abundance of evidence that the Mark was used, this type of affidavit has been declared insufficient for the purposes of a proceeding under section 45 of the Act. [See *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1980) 53 C.P.R. (4th) 62].

Since the owner of the Mark did not meet his burden of proof, I find that the registration of the Mark ought to be expunged.

Registration number TMA253521 will be expunged in accordance with subsection 45(5) of the *Trade-marks Act*.

DATED AT BOUCHERVILLE, QUEBEC, THIS 17th DAY OF JANUARY 2006.

Jean Carrière,
Member of the Opposition Board