

**SECTION 45 PROCEEDINGS
TRADE-MARK: ATTACHE
REGISTRATION NO.: TMA 307,726**

On September 14, 1998, at the request of Messrs. Sim & McBurney, the Registrar forwarded a Section 45 notice to The Rider Travel Group Inc., the registered owner of the above-referenced trade-mark registration. On November 26, 1999, The Rider Group Inc. was recorded as the new owner following an assignment that occurred on April 30, 1998.

The trade-mark ATTACHE is registered for use in association with the following services:
transportation of persons and goods by air.

In response to the notice, the registrant furnished the affidavit of Dallyce Macas. Each party filed a written argument. An oral hearing has not been requested in this case.

In her affidavit, Ms. Macas states that she is President of Attaché Concierge Services Incorporated (hereinafter “Attaché Services”). She submits that in February 1997, The Rider Travel Group Inc., created a new business division under the name “Attaché” which business was to provide a variety of specialized personal services, including services pertaining to air transportation. In April 1998, the “Attaché” business was transferred to The Rider Group Inc., a related corporation which operated the business until January 1999, when the business was transferred to “Attaché Services”. She indicates that she served as the Vice-President of “Attaché” during the time “Attaché” was operated as a division, first of Rider Travel and then of Rider Group and accordingly she has been responsible for management of the Attaché business since February 1997.

She submits that the ATTACHÉ trade-mark has been used in Canada continuously since February 1997 and was in use on September 14, 1998 in association with various services including air transportation services for both persons and goods. She indicates that the air transportation services provided to clients during the period from February 1997 to September 14, 1998 included booking and issuing tickets on regularly scheduled airline flights, chartering

aircraft (including jets and helicopters) for clients' private transportation, and shipping of clients' personal goods by air such as purchases made abroad, pets, antiques and art works. She provides sales revenues during the period from September 1997 to August 1998, and she indicates that throughout this period the trade-mark was displayed on company stationery, such as letterhead, envelopes, ticket jackets, labels and business cards, and in brochures, advertising sheets and newsletters circulated to customers and potential customers, and in print advertising placed in publications including The Globe and Mail, and Toronto Life. She attaches a representative sample of stationery and other materials used during the relevant period and a representative print advertisement published in Toronto Life in December 1997.

In its written argument the requesting party argues that it is clear from the materials attached to the Macas affidavit that the services offered by the registrant are not the transportation of persons and goods by air. In other words, the registrant does not perform the regulated services of an air carrier; rather, as paragraph 6 and Exhibits "B" and "C" clearly indicate, the registrant's services are more in the nature of an upscale travel agent, and not at all in the nature of a public carrier.

The registrant, on the other hand, submits that the services covered by the registration are not "air carrier services". That services such as booking and issuing tickets on regularly scheduled airline flights, chartering of aircraft for clients' private transportation, and shipping of clients' personal goods by air, clearly constitute air transportation services of persons and goods. The registrant reiterates that the purpose of Section 45 of the Trade-marks Act is to allow for the trimming of the register by getting rid of "deadwood" in the sense of trade-marks no longer in use. Further, in support of its contention that the services it performs are services covered by the registration, it relies on the case *Cassels Brock & Blackwell v. Sharper Image Corp.*, 33 C.P.R. (3d) 198 wherein it was found that the use of a trade-mark in connection with the delivery in Canada of mail and phone order purchases made to a store located outside of Canada constituted use of the trade-mark in Canada in association with "retail store services". The registrant adds that if the services in the registration were described as "the operation of an airline" or "the regulated services of a air carrier", the owner of the trade-mark might well have to answer the attack of the requesting party. However, it submits it is not the case. It argues that the registration covers

transportation services, and that this term is clearly broad enough to include services that relate to the arranging of transportation for others.

First, I find it is critical to point out that the services covered by the registration do not read “transportation services or services pertaining to air transportation” but rather “transportation of goods and persons by air”. Nevertheless, the evidence shows that one service the registrant provides is the arrangement for the “transportation of goods and persons by air” through an agent namely an air carrier. The exhibits show the manner the trade-mark would have been used or displayed by the registrant in the advertisement or performance of the services. Further from the statements of fact in the affidavit, it is clear that such services were provided during the relevant period.

As pointed out in *Value Village Markets (19990) Ltd. v. RTM et al*, 60 C.P.R. (3d) 502 at 507 (upheld by the Federal Court of Appeal) Section 45 is a summary procedure permitting the expungement from the register of trade-marks that have fallen into disuse. The appellant has the burden of establishing use of its trade-mark in accordance with the meaning ascribed in the Trade-marks Act. The Court then went on to state that in considering whether the affidavit material satisfies the “use” requirement in the Act, it is important to consider the purpose of the summary expungement provision of Section 45. It quoted the case *Noxema Chemical Co. of Canada Ltd. v. Sheran Manufacturing Ltd.*, C.P.R. 147 at pages 155-6, wherein President Jockett (as he then was) distinguished between the summary expungement proceeding as contemplated by the then Section 44 (now Section 45) and the formal procedure for expungement:

As I read s. 44 [now s. 45], it does not provide a summary procedure for determining whether a registered trade mark has been “abandoned” within the meaning of s. 18(1)(c). What it does, as I understand it, is provide a summary procedure whereby the registered owner of a trade mark is required to provide either some evidence that the registered trade mark is being used in Canada or evidence of “special circumstances that excuse ... absence of use”. The penalty for the registered owner failing to provide such evidence is that his trade mark becomes liable to be “expunged” ... What seems to be contemplated is that there will be on the registry many trade marks that the registered owners do not use and in respect of which the registered owners make no pretence of having any interest.

Also, the Court quoted the case *Meredith & Finlayson v. RTM*, 40 C.P.R. (3d) 409 at page 412, wherein Hugessen J.A. explained the objective of Section 45 in the following terms:

Section 45 provides a simple and expeditious method of removing from the register marks which have fallen into disuse. It is not intended to provide an alternative to the usual inter partes attack on a trade mark envisaged by s. 57. The fact that an applicant under s. 45 is not even required to have an interest in the matter (the respondent herein is a law firm) speaks eloquently to the public nature of the concerns the section is designed to protect.

These principles were reiterated in *United Grain Growers Limited v. Lang Michener, F.C.A.* decision dated February 20, 2001, Docket No. A-356-00.

Consistent with these principles, I conclude that the present trade-mark ought to be maintained. In my view, whether the statement of services in this case should be given its narrowest possible interpretation or its broadest possible interpretation is a difficult question of fact and law. However, considering the purpose of Section 45, I have chosen to give the registered services the broadest possible interpretation. Therefore as one of the services the registrant performs is the arrangement for the transportation of persons and goods through an agent (i.e. an air carrier), I conclude that the services that were rendered fall under the category “transportation of persons and goods by air”. Consequently, I conclude that the trade-mark was in use in association with the registered services during the relevant period.

Consequently, in view of the above, Registration No. 307,726 will be maintained in compliance with the provisions of Section 45 (5) of the Act.

DATED AT HULL, QUEBEC, THIS 25th DAY OF APRIL 2001.

D Savard
Senior Hearing Officer
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