

SECTION 45 PROCEEDING
TRADE-MARK: OFF BROADWAY
REGISTRATION NO.: 275,003

On May 5, 2005 at the request of Ridout & Maybee LLP, the Registrar forwarded the notice prescribed under Section 45 of the Trade-Marks Act to Comark Inc., the registered owner of the above-referenced trade-mark registration.

The trade-mark OFF BROADWAY is registered for use in association with the following services:

“Operation of retail merchandising establishments for the sale of ladies’, teenager’s and children’s clothing, apparel and accessories”.

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 5, 2002 and May 5, 2005.

In response to the notice, the affidavit of Richard Schulte together with exhibits has been furnished. Neither party filed a written argument and an oral hearing has not been requested in this case.

Mr. Schulte is President in charge of Comark Inc. He states that the registrant is headquartered in Mississauga, Ontario and is a leading Canadian small-based apparel retailer operating a total of over 300 stores and that it has operated stores under the trade-mark OFF BROADWAY in Canada during the relevant period.

As Exhibit A he attaches a random sampling of invoices all dating between 2001 and 2003, evidencing sales of clothing, apparel and accessories sold to consumers at OFF BROADWAY retail outlets at six (6) different locations throughout Canada. He then provides figures outlining the number of retail stores Comark Inc. has operated over the years in Canada under the trade-mark OFF BROADWAY.

Having considered the evidence, I find that it is sufficient to permit me to conclude that the trade-mark OFF BROADWAY was in use in Canada during the relevant period in association with the registered services.

With respect to services, s-s. 4(2) of the Act states that “a trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services”.

Here what the evidence shows is that the registrant was operating retail establishments before and during the relevant period. Further, the evidence shows that the trade-mark appears at the top of the invoices (i.e. sales receipt) issued to the customers. Consequently, this satisfies me

that during the relevant period the trade-mark was being used in the performance of the services. Although quite a few of the sales receipts furnished bear dates outside the relevant period, some clearly show transactions that have occurred during the relevant period namely on May 29, 2002; July 10, 2002; August 16, 2002; August 24, 2002; July 29, 2002; May 25, 2002; October 23, 2002; January 30, 2003; December 27, 2002; January 13, 2003; September 16, 2002; and June 15, 2002.

Having regard to the evidence as a whole, I conclude that it shows that the trade-mark was in use in Canada during the relevant period in association with the services.

Registration No. 275,003 will therefore be maintained in compliance with the provisions of Section 45(5) of the Act.

DATED AT GATINEAU, QUEBEC, THIS 28TH DAY OF FEBRUARY 2007.

D. Savard
Senior Hearing Officer
Section 45 Division